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Statement of

MATTHEW ORISTANO

CHAIRMAN, PEOPLE'S CHOICE TV

On behalf of the  
WIRELESS CABLE ASSOCIATION

Before the

FEDERAL COMMUNICATIONS COMMISSION

December 18, 1997

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## **PEOPLE'S CHOICE TV CORP. (PCTV)**

PCTV is a major public wireless cable operator. Founded as a private partnership in 1988, it became a public corporation on NASDAQ in 1993. PCTV licenses the wireless cable spectrum in major metropolitan markets covering 11 million BTA TV households. These markets include operating systems serving approximately 73,000 subscribers in Chicago, Detroit, St. Louis, Phoenix, Houston, and Tucson, and markets still to be launched include Indiana, Milwaukee and Salt Lake City.

PCTV leases spectrum from virtually every major ITFS entrant in the U.S., including Arizona State, Wayne State, the Catholic Archdiocese, University of Arizona, Instructional Television Foundation, NITV, Illinois Institute of Technology, and many more. PCTV has invested tens of millions of dollars in cash and equipment to promote ITFS.

In 1996, PCTV announced that it would cease installing analog video customers, and begin deployment of the new digital compression technology. PCTV's first digital compression system will launch in 1998, and have the capacity to serve customers with up to 250 video channels, CD quality audio, and high speed Internet service.

PCTV's headquarters is in Shelton, Connecticut, and the company employs over 350 people.

## **BIOGRAPHY: MATTHEW ORISTANO**

Matthew Oristano is Chairman and Chief Executive Officer of People's Choice TV. Mr. Oristano started PCTV as a private partnership in 1988, and took it public in 1993. He is on the board and executive committee of the Wireless Cable Association International, and is Chairman of their Government Relations Committee.

Mr. Oristano and his family have been in the cable industry for over 30 years, having built systems in Florida, Pennsylvania, New Jersey, and Connecticut. In 1984, they sold their US cable systems, and were the first Americans to win and build a cable franchise in the United Kingdom. Mr. Oristano also founded the Bravo movie service in the UK. In 1987, Oristano began entering the wireless cable business in the United States.

Mr. Oristano is a past president of the Connecticut Cable Television Association, and was on the executive committee of the Cable Television Association of Great Britain. He holds a degree in physics from Rennselaer Polytechnic Institute.

## SUMMARY

The wireless cable industry appreciates the opportunity to brief the Commission regarding the status of competition in the multichannel video industry. This issue is one of critical importance, and one on which the Commission is empowered to have an immediate and beneficial effect if it so chooses.

The promise of the 1992 Cable Act is largely unfulfilled. Cable operators still have an 87 percent market share of all video subscriptions. Cable operators still control the vast majority of subscription program services, and with them their competitors costs. The cable industry has actively sought to take advantage of loopholes in the 1992 law.

Promises of competition generated by lobbying for the 1996 Telecom Act also lay fallow. While two telephone companies, Ameritech and Bell South, have started to compete with the cable industry, the rest of the telephone industry has backtracked significantly from competing. Even a prospectively vigorous satellite competitor (the proposed Murdoch/MCI DBS venture) has thrown its lot in with the cable industry.

Unless the FCC acts promptly, competition within the industry may be permanently impaired. The cable industry will consider itself victorious in avoiding all but a fig leaf of competition. The Commission must act in the following areas:

- 1) Make programmers such as Murdoch and Microsoft, who do not follow the program access requirements, do so immediately;
- 2) Force programmers to divulge their true rate cards, rather than play a shell game of discounts with favored customers;
- 3) Prevent programmer/operators from migrating programming to "loophole

platforms", such as fiber delivery;

4) Prevent broadcasters, who benefit greatly from a free grant of public spectrum, from aiding and abetting monopolistic cable practices by licensing channels exclusively to monopoly cable.

STATEMENT OF  
MATTHEW ORISTANO, CHAIRMAN PEOPLE'S CHOICE TV  
ON BEHALF OF THE  
WIRELESS CABLE ASSOCIATION  
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Introduction

My name is Matthew Oristano, and I am Chairman of People's Choice TV -- a wireless cable operator providing services in several communities across the country. PCTV transmits its signals in nine major markets in the US and has the potential to reach over 11 million subscribers. Markets served include Chicago, Detroit, Milwaukee, Houston, Phoenix, Indianapolis, St. Louis, Tucson and Salt Lake City. I am also the Chairman of the Government Relations Committee of the Wireless Cable Association International. In addition, my family has owned and operated cable TV systems in the US and UK from the mid 1960's to the late 1980's. I thank the Commission for the opportunity to appear on behalf of the Wireless Cable Association to talk about obstacles that need to be cleared away in order to promote competition in the video marketplace.

The cable industry should be well pleased with itself. In spite of Congressional legislation in 1992 which mandated program access to competitors, cable has managed to maintain price and access advantages unimagined by the creators of the 1992 Act. In spite of Congressional legislation in 1996, cable has remained largely unaffected by competition from its most feared opponent, the telephone industry. In spite of declarations of war by Rupert Murdoch, MCI, ATT, and Echostar, cable has been able

to either turn satellite opponents into allies, or marginalize their competition. In spite of a period of uncertainty on Wall Street, cable stocks have rebounded as the industry has convinced the investment community that for all practical purposes it has that most prized of franchises; an unregulated monopoly. If the Commission does not act soon on several fronts, the battle for video competition will be over before it begins.

#### Program Access: Gaming the System

The situation in 1998 is very different from 1992. After the 1992 Act, cable operators retreated on part of the field, and belatedly granted their competitors access to programming controlled by means of vertical integration. Cable then immediately started working on several other fronts. As a result, there are today alliances between cable and broadcast TV (NBC, Fox, CBS) which create exclusivity, cable and satellite programmers (Murdoch) which create exclusivity, cable and a software company (Microsoft) which create exclusivity, and cable and former cable operators (Viacom) which create exclusivity. The cable industry control of programming, if diagrammed with all of its equity, licensing, carriage agreement, and quid pro quo relationships, creates a web which has the effect of ensnaring all competitors.

Immediately upon passage of the 1992 Cable Act, negotiations began between cable and the broadcasters for "retransmission rights". It was envisioned that cable companies would pay for these rights, and the broadcasters would receive financial benefit. It didn't work out that way. Trumpeting their complete victory over the broadcasters, the cable industry paid nothing for retransmission rights. Instead, it began

licensing new channels from broadcasters. Channels such as MSNBC, F/X, Fox News, CBS Eye on People, and others were created as a way for broadcasters to get something other than money for carriage of their free TV channels on cable. The cable industry demanded these channels be exclusive. Thus, today, companies like PCTV, Ameritech, Wireless One and others are faced with NBC using its free television franchise to undermine cable competition. Celebrities like Tom Brokaw, Katie Couric, and Jane Pauley exhort viewers to tune to MSNBC as soon as they're done watching NBC, even though cable's competitors on the ground can't get MSNBC. The situation will grow worse as Microsoft introduces Windows 98, and places an MSNBC icon on each desktop. The ability of new desktop PC's to process video can then be used by the monopoly software provider to push viewers to the monopoly video provider. Today, MSNBC is vertically integrated by virtue of Microsoft's \$1,000,000,000 investment in Comcast. However, MSNBC still refuses to license to cable competitors:

Earlier this year, Rupert Murdoch's dramatic moves with his proposed competitive DBS venture ASkyB made headlines. At a hearing on April 10th 1997 before the Senate Commerce Committee, Mr. Murdoch specifically stated to Chairman McCain that he would not withhold Fox programming from unaffiliated program distributors and that further that Fox would "sell its programming to any customer." It is 8 months later and this has simply not happened. And despite Mr. Murdoch's assurances to the contrary, we see no signs that it will happen anytime in the near future. Today, the Murdoch channels F/X and Fox News offer cable operators a "terrestrial exclusive," meaning that wireless operators and telco overbuilds are prohibited from getting these Fox Programming services. The Murdoch plan for cable competition has been turned into an alliance with

cable, as he now proposes to merge his DBS property into Primestar, which is owned by the cable industry. Having joined his operating venture with cable, the Murdoch channels exchanged equity with Liberty, a subsidiary of TCI. EVEN THOUGH MURDOCH'S CHANNELS ARE NOW VERTICALLY INTEGRATED AND REQUIRED TO PROVIDE ACCESS TO CABLE COMPETITORS, THEY CONTINUE TO REFUSE TO DO SO.

With regard to former vertically integrated programmers, Viacom operates the most popular channel on all of cable, Nickelodeon. But it uses Nickelodeon to promote TV Land, which cable competitors cannot get. During the period when Viacom was vertically integrated, it was in full negotiation to deliver TV Land to cable competitors. Deals had been cut, and contracts were being drafted. Then, however, TCI agreed to purchase Viacom's cable properties for over \$2,000,000,000 of badly needed cash. Immediately after the sale of its cable properties to TCI, Viacom ceased all negotiations, and today, TV Land remains unavailable, even though competitors are forced to carry ads for it on Nickelodeon. It appears as though Viacom, which had previously sued TCI for anti competitive practices, could no longer take the heat.

Finally, there are the loophole channels, being created by cable. Several cable operators have openly spoke of migrating content now delivered by satellite to fiber optic and microwave feeds, for the purpose of avoiding the access requirements. The 1992 act was meant to exempt programming which is truly local, by looking only at satellite distribution. The cable industry is moving to take advantage of progress in other distribution technologies to move regional channels out of the range of competitors. Most often, these channels are the professional sports channels, which engender the most



enthusiastic and loyal viewers, viewers that cable wishes to keep all to itself.

Cable will tout the fast growth of DBS as "proof" of healthy competition, and will cite channels it sells to DBS, but not to "terrestrial" competitors. But some facts need to be remembered here. Cable doesn't have to withhold programming from DBS companies, because the most important programming of all is already withheld from them; local broadcast TV channels. Because DBS doesn't have the capacity to retransmit all the local TV channels it needs to, cable can make a show of licensing other product to DBS. It is interesting that the result is that no matter what cable competitor you look at, in the sky or on the ground, it is handicapped by the lack of some programming. Is this a coincidence? Also, a major DBS entry, Primestar, IS OWNED BY the cable industry. Is this real competition? Frankly, rather than be allowed to merge with Murdoch, we believe cable should be forced to divest itself of Primestar.

#### Program Pricing: Nothing Grows Without Sunshine

Cable has used the small number of program access complaints at the Commission as "proof" that there is no problem. The fact of the matter is that many issues in program access are not susceptible to resolution the way the Commission now handles them. In particular, many operators strongly believe that they are being significantly overcharged for vertically integrated services compared to the cable monopoly. This overcharging enables cable to economically cripple small competitors who depend on current cashflows for access to finance. Banks will typically finance TV cashflows at a 5 times multiple. If excessive fees for cable programming can reduce a competitor's cashflow in a given

system by \$1,000,000, then that represents \$5,000,000 of finance that cannot be deployed to compete. Repeat this over and over in franchise after franchise, and you have a possible reason why competition has been slow in coming. But no matter how much cable competitors are being overcharged, there is no ability under the Commission's regulations to bring a complaint without specific information, and there is no ability to get any information about what cable programmers ACTUALLY charge their masters, net of all hidden discounts, marketing subsidies, and quid pro quo's between deals. Thus we are in a position that demands a discovery process for the access regulations to have any teeth. If there were discovery, we believe the Commission would see far more activity in programming complaints than it has to date. As it is now, an operator must weigh the chilling proposition of instituting an unsuccessful proceeding against his prime supplier, gaining no information in the process, and the consequences that may have at contract renewal time. Remember, this is a battle where time is on cable's side. Many aspects of program access regulation sunset in 2002. Cable has already lasted halfway from the passage of the Act. From the monopoly's point of view, they're in the home stretch.

#### The 1996 Act: Legislation Without Competition

We all remember it. The fervent promises, the fevered lobbying. If only Congress would deregulate telephony and video, competition would flow across the borders. The cable industry was making loud noises about gearing up to provide telephone service. The telco's were charging to the video consumer's rescue. In this heady environment, the 1996 Telecommunications Act was passed. The telephone industry had done high profile

deals, and made headlines. Bell Atlantic and NYNEX had invested in CAI Wireless, and would sweep the east coast from Boston to D.C. with untethered competition. PacTel had bought most of the wireless rights in California, and was moving to deploy digital video. SBC was testing fiber delivered video. AT&T had bought into DirecTV. MCI had bought a DBS license with Murdoch. The RBOC's had formed Tele-TV, which would match the cable programming juggernaut. Where are these competitors today? Nowhere. The 1996 Act has passed, and both cable and telephone have crept back into their caves, and the roaring has ceased. Those that have followed through with aggressive competition, Ameritech and Bell South, are the exceptions to the rule. Tele-TV is defunct, CAI Wireless lost its investors (causing a crash in wireless cable stocks that they have not recovered from), AT&T is out, MCI is getting out, Murdoch has joined up with TCI, and PacTel's Los Angeles wireless system is for sale. In perhaps the most egregious example of this competitive détente, SBC is returning the competitive cable customers that PacTel won in San Jose back to TCI, and shutting the overbuild cable system off. One wonders if this is some form of peace offering.

While the competition in system operation is slow, competition in programming is non-existent. None of the major sources of competition, telco, DBS, or wireless, have yet been able to create programming resources to compete with those owned by cable. As a result, cable continues to expand its hold on distribution networks. The new digital video systems can carry hundreds of channels, but they're largely hundreds of cable controlled channels. All cable programmers are multiplexing their content, so that today we have a number of Discovery channels, Encore channels, HBO's, Cinemaxes, and so on. Thus cable controlled programs will fill every video shelf before any alternative

offerings can arrive.

The hope for local competition to cable lies mostly where it did in 1992; with small entrepreneurial operators, who rely on government oversight rather than economic clout to keep cable honest. Wireless cable stocks are at their all time lows, while cable is at historic highs. Wall Street has made its bet, and it's a bet on the monopoly. Only the Commission can ensure that the game isn't rigged.

### ACTION

We respectfully urge this new Commission to finish the business of ensuring a competitive environment. The law needs to be enforced, quickly and fairly, using the following methods:

1) Do not allow any transfer of the Murdoch DBS license to Primestar, until the Fox channels such as F/X, Fox Movies, Fox News, etc are licensed at cable rates to cable competitors. Do not accept promises, as these have been made before. Make the rate cards be disclosed. If Fox continues to flout the program access laws, its broadcasting license renewals should be viewed in that light.

2) Make Vertically Integrated Programmers Obey the Law Now. Microsoft owns a billion dollars of Comcast stock. Microsoft is negotiating with TCI to buy their stock. Microsoft wants to make the operating system for the next generation of cable TV set top boxes. Why isn't MSNBC available to competitors, when they're vertically integrated?

3) Let the Sun Shine In. Cable competitors feel strongly that they're paying much more for programming than the owners (and friends of owners) of that

programming. Why do the vertically integrated programmers get to self-deal under the table? Why can't they have an established real rate card, and sell from it? What are they afraid of? The Commission should immediately move to implement a discovery process in program rate complaints.

4) Close the Loopholes. Cable programmers plan to migrate important programs away from access regulations. The Commission should prevent this. No program that has been satellite delivered should be allowed to migrate.

5) Don't Let Broadcasters Abuse Their Licenses. Retransmission consent has turned into a bonanza for cable. Broadcasters use their free TV licenses to drive viewers to the cable monopoly. The Commission should require any holder of a free broadcast license to license affiliated subscription channels to all competitors. This issue will become even more important when broadcasters attempt to use HDTV licenses for subscription as well.

### Conclusion

As we enter 1998, the state of cable competition is simple. There's very little, and it's in danger. The Commission is in a position to rectify oversights of the '92 and '96 Acts, and enforce the law. Cable's competitors, consumers, and the Commission all have much to gain by seeing the good intentions of the '92 and '96 Acts become reality. The WCAI thanks the Commission for the opportunity to air these important issues.